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April 13, 2000

CALFED Bay-Delta Program

Mr. Steven R. Ritchie
Acting Executive Director
CALFED Bay-Delta Program
1416 Ninth Street, suite 1155
Sacramento, CA 95814

Dear Mr. Ritchie:

I was in the audience April 13, when the East Bay Municipal Utility District (EBMUD) actions were discussed in the public comment period. I too read the April 12, 2000 article in the Contra Costa Times regarding conversations with EBMUD representatives and their need for more and assured water supply. Mr. John Coleman, President of EBMUD Board of Directors talked about plans to build an isolated facility around the Delta for its use. According to the article, Mr. Coleman of EBMUD is willing to share American River water with other Bay Area suppliers if they will support its (EBMUD) actions before the State Board. EBMUD, according to State Board Decision D1641, has already entered into a Memorandum of Understanding in 1996, with the California Urban Water Agencies export contractors and the agricultural export contractors (CUWA / AG) to gain support for its Joint Settlement Agreement (JSA) with the U.S. Fish and Wildlife Service and the California Department of Fish and Game (which was finessed by EBMUD's politically pressure). The CUWA / AG agreement endorses EBMUD's concept that the Mokelumne River flow obligation under the JSA satisfies all of EBMUD's obligations for meeting the flow-dependent objectives in the 1995 Bay-Delta water quality control plan.

During Phase 4 of the Bay-Delta hearings CUWA / AG and EBMUD folks proposed to the State Board that the flow releases in the JSA will satisfy EBMUD's obligation toward meeting the flow-dependent objectives of the 1995 plan. The USFWS, in its testimony, did not support EBMUD flow releases as satisfying the EBMUD obligations to meet the flow-dependent objectives of the 1995 plan. Also the USBR opposed the agreement and has not offered to provide additional flow, if needed to backstop the agreement.

Protecting water quality is a core policy of CalFed. It is also a valuable water conservation measure. The way I see it is the more water quality is protected, the greater the capability for its reuse, thereby increasing or stretching the available water supplies for all beneficial uses from headwaters to the Delta pool.

The Delta and its tributary inflow contribution comprise what has been called the "the Delta pool". Few places need public trust protection more than the Delta. The Delta pool, its water quality, its tideland and submerged lands, its fish and wildlife resources and the habitat upon which they depend, are all protected by the public trust doctrine. The water quality of the Delta pool is important to Delta agriculture, to the urban communities that use water exported from the Delta, and to the viability of the native species of anadromous fish, such as various runs of Chinook salmon, steelhead, green and white sturgeon and many other native fishes.

Judge Racanelli, commenting on the duties of the State Board, in his 1986 decision, (U.S. v State Water Resources Control Board, 227 Cal. Rpt. 161 - 1986), indicated that the Board needs to consider the impacts of all upstream diversions and uses of water. It is essential that the Board take a global perspective in carry out its water quality-planning obligation. The "Fair Ecological Share" (FES) concept easily fits Racanelli's global perspective (Sacramento / San

Joaquin Basin) of having all rivers and streams tributary to Delta, contribute instream flows to protect water quality and other beneficial uses of the Delta pool.

It is important that the FES concept be applied to all streams and rivers of the Central Valley Basin. Any reduction of the FES contribution from a tributary or lowering the Federal water quality standards to a lesser standard must be demonstrated to be in the public interest, consistent with public resources, uses and values of those waters protected by the public trust doctrine, not for the mere convenience of a diverter, water contractor or a waste discharger.

Members of the Sacramento Area Water Forum, realized that the American River and the Delta, their respective resources, uses and values, such as water quality, are of region and statewide importance. The American River, like other tributaries to the Delta, is in fact tied together as an integral ecosystem. What affects the Delta can impact the resources, uses and values of the American River and the other Delta tributaries. For EBMUD to push for its own Peripheral Canal or isolated facility flies in the face of legal and institutional constraints. In addition much has happened since the 1990 decision and physical solution by Judge Hodge in EDF v EBMUD regarding the Lower American River, the Delta pool, its resources, uses and values.

- * Several species of naturally produced fish that are dependent upon the ecological conditions of the Lower American River and the Bay/Delta system have been listed under the Federal and California Endangered Species Act.
- * Stringent water quality standards have been established to protect Delta water quality and associated beneficial uses covered by the public trust doctrine will require increased flows through the Delta.
- * The Bureau's Central Valley Project has an obligation to contribute the flows necessary to meet Delta water quality and outflow standards.
- * Upstream water right holders diverting to storage have an obligation to contribute the flows necessary for meeting Lower American River needs as well as Delta water quality and outflow standards.
- * Central Valley Project Improvement Act (CVPIA) commits additional water to protect instream ecosystems and associated trust purposes as well as to lands of the National Wildlife Refuge system.
- * An overriding objective of the CVPIA is the equal priority for fish and wildlife (also water quality) with other beneficial uses (CVPIA Section 3406(a) (3)).
- * Errors in the Bureau's PROSIM model revealed that the American River and Sacramento River Watersheds are significantly drier than what was understood in 1990 at the time of the decision by Judge Hodge.
- * Treatment technologies have greatly improved to allow EBMUD to safely and economically process Delta water which is already being used by 20 to 23 million Californians.

CalFed was established, in part, to investigate water supply / water quality issues and make recommendation with full public disclosure of options for correcting water quality problems or for providing additional water supply. However CALFED should not delve into the EBMUD

American River issue without first getting input from the Water Forum and its many diverse stakeholders.

In my opinion an EBMUD Delta diversion point is the only Principled position for the people of California to support. It is Right:

Because it helps protect the integrity of the Lower American River and the Delta pool;
Because it helps protect Delta -Bay resources, uses and values (public trust interests).
Because it helps the State of California carry out its duties and responsibilities;
Because it helps the Bureau of Reclamation protect Delta water quality for Delta agriculture and for urban communities utilizing the Delta pool for export supplies;
Because it support the intent of Fish and Game Code Section 5937 and its "in good condition" for all aquatic life and life stages below a dam downstream to the receiving waters, in this case the Delta and San Francisco Bay;
Because it will help meet the objectives of the CVPIA's Anadromous Fish Restoration Program;
And it is Right because it is consistent with the purpose and intent of the Mono Lake and Racanelli decisions, therefore it is in the best overall interest of the state.

With an active Delta diversion point, EBMUD becomes a part of the solution to the Delta's resources and water quality issues, rather than continue as part of the problem.

If all Delta tributaries (including the Mokelumne River) contributed the same percentage of their natural historic Delta inflow as the American River does under the Judge Hodge decision, the issues of water quality for Delta agriculture and urban areas, for export, for fish and other aquatic resources would be much more manageable.

Please consider these comments in your deliberations.

Sincerely,



Felix Smith
4720 Talus Way
Carmichael, CA 95608
916-966-2081

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DRAFT - April 13, 2000